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## BOOK REVIEWS

*Limitations on the Treaty-Making Power Under the Constitution of the United States.* By HENRY ST. GEORGE TUCKER. (Boston: Little, Brown and Company. 1915. Pp. xxi, 444.)

Recent conflicts, either actual or possible, between the treaty-making power of the United States and the reserved rights of the States, have given rise to a considerable body of literature. Most of this has been concerned with the nature and extent of the treaty-power and has assigned to it a very broad scope; the opinion accepted by the authority as well as by the majority of the writers is that the reserved powers of the States do not operate as a curtailment. With a method and result contrary to these authors, Mr. Tucker has written an able, and since that of Butler the most elaborate work on the treaty-making power. He is concerned, however, not with ascertaining its nature and extent, but with setting limits to its exercise. A treaty, he concludes, may not abridge any individual rights guaranteed by the Constitution; it may not bind the United States to do what is forbidden by the Constitution; it may not "oust Congress of its exclusive constitutional grant of the power to legislate" on the enumerated subjects; it may not change the form of government of the United States; it may not confer greater rights on foreigners than are accorded citizens under the Constitution, and, finally, when the "control or protection of [personal and property] rights is, under the Constitution, confided to any department of the government or to a State, such department or State, as the constitutional repository of such rights cannot be ousted of their (*sic*) jurisdiction by having the same transferred to the treaty-making power."

In asserting several of these limitations Mr. Tucker merely follows the accepted opinion. His statement as to the power of the House of Representatives is probably too broad, but the chapter in which he discusses the subject is excellent, and as an addendum he prints the well known report on the Hawaiian Treaty made to the House of Representatives by his distinguished father (J. Randolph Tucker) in 1887. There is also a valuable analysis of the diplomatic correspondence relating to treaty obligations to foreigners. "It would seem," Mr.

Tucker says, "that there could be no doubt of the power of Congress to enforce by appropriate legislation the constitutional treaties entered into by the United States with foreign countries," e.g., by making offences against treaty rights cognizable in the federal courts. To the reviewer, however, the constitutional question does not admit of such a categorical answer; at least some mention should have been made of authority to the contrary, such as the valuable report to the American Bar Association in 1892 which is severely criticized by Professor Taft in his recent volume, *The United States and Peace*. But in any event, Mr. Tucker's opinion on this point seems inconsistent with his belief "that no essential power of a State, whether a reserved power or a police power, can by reasonable construction be constitutionally taken from it, in furtherance of the treaty-making power." This is the most important as well as the most questionable conclusion of the book; it is opposed by all recent writers, such as Willoughby, Corwin, Butler, Burr and Delvin.

To maintain his view Mr. Tucker first marshals the opinions of many authors and statesmen, who are considered to furnish supporting authority. But, read without a desire to twist the meaning, these excerpts are of slight importance. Story's opinion, for example, was that "the peace of the nation, and its good faith, and moral dignity, indispensably require that all State laws should be subjected to their [treaties'] supremacy." This passage (*Commentaries*, Sec. 1838) is not quoted by Mr. Tucker, but a more equivocal one is. Even this, if read fairly furnishes no support for his position. Story was followed by Cooley, who in turn is cited by J. Randolph Tucker in his work on the Constitution, and so none of these three can be said to maintain the supremacy of a State law. Similarly, nearly all of the writers quoted by the author of the volume under review can be shown either to be silent on this particular question, or to anticipate the prevailing view as to the extent of the treaty-making power. Such an interpretation has been convincingly made by Professor Corwin in his *National Supremacy*. After quoting "authors and statesmen" Mr. Tucker proceeds with an examination of the opinions of judges which calls for the same criticism. Here are set out the *dicta* which Willoughby thinks "will sooner or later be frankly repudiated by the Supreme Court."

Mr. Tucker then considers the treaty-making power under the articles of confederation and the grant in the Constitution. He devotes some space to an analysis, and a partially effective refutation, of the broad claims made by Butler on the ground that the treaty-making

power is inherent in sovereignty—a view not held by Corwin, Willoughby, and others. Then Mr. Tucker summarily disposes of the line of early cases decided by the Supreme Court (such as *Chirac v. Chirac*, *Hauenstein v. Lynham*, *Geofroy v. Riggs*, etc.) and which are counter to the view he is maintaining. These cases, according to the author, simply held that the treaty-making power may remove the badge of alienage from foreigners, and thus take them out from the operation of State discriminatory laws regarding descent and inheritance. In these cases, Mr. Tucker concludes, there was no annulment of local regulations. All the opinions in *Ware v. Hylton* are given an exhaustive analysis, and the unusual view advanced that the case did not declare the Virginia law to be invalidated by the Treaty of Peace of 1783. The argument is too complex to be summarized here; suffice it to say that Mr. Tucker's interpretation of these cases is altogether novel. Commentators and courts have, almost without exception, considered the cases as authority that the treaty-making power may infringe the rights of a State. (An excellent, although not so exhaustive, analysis of *Ware v. Hylton*, stating the common deduction from the case, is given by Burr, *The Treaty-Making Power*, pp. 339–345.)

With this disposition of precedent contrary to his thesis, Mr. Tucker is ready to consider the nature of the police power and its relation to the treaty-making authority. He recognizes that there is a line of cases, beginning with *Gibbons v. Ogden* and now constantly added to, making the police power subject to Congressional regulations under the commerce clause. This, however, furnishes no ground for a similar view with regard to the treaty-making authority. The grant of the power to conclude treaties is *general*; the powers reserved to the States are *specific*. In the construction of deeds and wills, a *general* grant is limited by a *specific* grant; the same is true in the American constitutional system. It hardly needs to be said that such reasoning is not conclusive.

In a book such as this, which makes novel deductions from familiar precedents, it is not unreasonable to expect at least a mention of the more important opposing authorities. But there is no reference to Corwin's *National Supremacy* or to Burr's *The Treaty-Making Power*. Butler's opinions are adequately treated, probably because they are extreme and in some respects more easily controverted. Willoughby is criticized because he attaches no importance to *Compagnie Française v. Board of Health*, in which the court held valid a State quarantine law, on the ground that there was no conflict between it and the treaty in question.

The opinion does not contain the slightest implication that if there had been a conflict, the State law would have prevailed. One can with difficulty resist the conclusion that Mr. Tucker's reasoning from this and the earlier cases is as follows: when the treaty is enforced, the State law is not struck down; when, however, the State law is enforced (although there is no question as to supremacy), the court would, if necessary, have struck down the treaty. The most conspicuous illustration of this tendency to twist authority is in the chapter on the Japanese-California Controversies. Mr. Tucker coolly cites President Wilson and Secretary Bryan in support of his view that the California land tenure law was supreme as against the treaty, when, from the diplomatic correspondence quoted, such a conclusion does not appear remotely valid.

This necessarily brief summary will serve to show the general character of Mr. Tucker's arguments. His work is painstaking, scholarly, and clearly and simply written. The conclusion is inevitable, however, that the book is a piece of special pleading rather than a scientific treatise.

LINDSAY ROGERS.

*Austria-Hungary and the War.* By ERNEST LUDWIG, with an introduction by Dr. Constantin Theodor Dumba. (New York: J. S. Ogilvie. 1915. Pp. 217, with two appendices.)

A voluminous literature has arisen already concerning the present European war and its causes. Unfortunately much of it has been done too hastily, with little regard for the historical, political and economic background and without a serious attempt at genuine historical research among official or authentic sources. And far too large a proportion of it has been penned to defend the position or action of this or that belligerent. It takes a skillful reader these days to pick out what is really "worth while," for the number of books and articles now being written on this war, which will survive the test of time and investigation, is not likely to be large.

In writing *Austria-Hungary and the War*, Herr Ludwig was fulfilling a patriotic duty. He is the imperial and royal consul of Austria-Hungary in Cleveland, Ohio; and, his magazine articles on this subject being returned unused by American editors, he prepared this work because "we would like to convince the American public that this war is not of our making." The publishers announce that the "book contains a comprehensive presentation of the political forces and his-